

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Boralex Livemore Falls, Inc.)	Docket Nos.	ER01-2569-005
Boralex Stratton Energy LP)		ER98-4652-005
Boralex Ft. Fairfield LP)		ER02-1175-004
Boralex Ashland LP)		ER01-2568-003

**REQUEST FOR LEAVE TO FILE RESPONSE AND RESPONSE OF
THE MAINE PUBLIC UTILITIES COMMISSION**

The Maine Public Utilities Commission (“MPUC”), by and through counsel, Lisa Fink, State of Maine Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018, and Lisa S. Gast, Duncan, Weinberg, Genzer & Pembroke, P.C., 1615 M Street, NW, Suite 800, Washington, DC 20036, respectfully requests leave to file a brief Response to the comments filed by the Northern Maine Independent System Operator Corporation (“NMISA”) and Boralex Industries, Inc. (“Boralex”) on September 26, 2007.

I. REQUEST FOR LEAVE TO FILE RESPONSE

The MPUC requests that the Commission grant the MPUC’s Motion for Leave and consider the MPUC’s Response herein since the MPUC’s Response will aid the Commission in its understanding of the issues presented and the positions taken, and will ensure the development of a complete record.¹

¹ See, e.g., *See Arizona Pub. Serv. Co., et al.* 106 FERC ¶ 61,021 at P 9 (2004); *Pacific Gas & Electric Co.*, 93 FERC ¶ 61,322 at 62,103 (2000); *American Transmission Company LLC*, 93 FERC ¶ 61,267 at 61,857 (2000); *Delmarva Power & Light Co.*, 93 FERC ¶ 61,098 at 61,259 (2000); *Commonwealth Edison Co.*, 93 FERC ¶ 61,040 at 61,085 (2000); *Sierra Pacific Power Co. & Nevada Power Co.*, 93 FERC ¶ 61,107 at 61,302 (2000); *California Power Exchange Corp.*, 92 FERC ¶ 61,093 at 61,372 (2000); *Tennessee Gas Pipeline Co.*, 55 FERC ¶ 61,437 at 62,306 n.7 (1991).

Although the Commission, in its September 7, 2007 Notice Granting Request to File Additional Comments, did not specifically provide for responsive comments by the MPUC, the Commission will allow otherwise unauthorized answers where, as here, an answer provides further explanation or otherwise helps to ensure the existence of a full and complete record and Commission understanding of that record. Additionally, although a response to an answer is not provided for under Rule 213 of the Commission's Rules of Practice and Procedure, the Commission allows such response where the information provided will facilitate the Commission's decisional process, or aid in the Commission understanding of the issues in the dispute.² Similarly, the Commission will consider an otherwise impermissible reply when it enhances or facilitates a full and complete record upon which the Commission can base its decision.³ The Commission also permits such responses where the information provided in the answer assists in the understanding of the parties' positions.⁴

² See *Egan Hub Partners, L.P.*, 73 FERC ¶ 61,334 at 61,929 (1995) ("Although our rules do not permit answers to answers, we may for good cause, waive this provision. We find good cause to do so in this instance in order to clarify the issues in dispute."); *New York Independent System Operator, Inc., et al.*, 91 FERC ¶ 61,218 at 61,797 (2000) (allowing otherwise impermissible answer deemed "useful in addressing the issues."); *Central Hudson Gas & Elect. Corp. et al.*, 88 FERC ¶ 61,138 at 61,381 (1999) (accepting impermissible answers because they helped to clarify the issues); *Pacific Gas and Elec. Co., et al.* 77 FERC ¶ 61,204 at 61,808 (1996) (allowing impermissible answers that assist in the understanding of the issues raised); *Buckeye Pipe Line Co.*, 45 FERC ¶ 61,046 at 61,160 (1988) (Good cause exists for consideration of prohibited answers where "they help explicate issues that are important to this proceeding . . .").

³ See *The New Power Co. v. PJM Interconnection Inc.*, 98 FERC ¶ 61,208 at 61,756 (2002) (allowing otherwise impermissible answers "on the basis that they provide new factual and legal material that helps the Commission in its decision-making process."); *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (Noting that Rule 213 "prohibits the filing of an answer to an answer unless otherwise permitted by decision authority" but accepting such an answer that was deemed "helpful in the development of the record.").

⁴ See *Kansas City Power & Light Co.*, 53 FERC ¶ 61,097 at 61,282 (1990) ("Here, the information set forth in the answers has assisted us in understanding the parties' positions. Accordingly, on this basis and given the absence of any undue prejudice and delay, we will accept all the answers.").

Because the MPUC's Response assists in the understanding of the relevant geographic market, the MPUC's Motion for Leave to Respond should be granted and its Response considered by the Commission when it addresses Boralex's market power analysis in this proceeding.

II. BACKGROUND

On August 29, 2007 the Commission held a Technical Conference in the above-captioned dockets to address the following issues raised with regard to Boralex's updated market power analysis: (1) what is the relevant geographic market for Boralex's market power analysis – the Northeast Power Coordinating Council's Maritimes Control Area ("MCA") or the Northern Maine Independent System Administrator ("NMISA") region; (2) should Boralex be disallowed from deducting long-term firm non-requirements capacity in its market power analysis due to extraordinary circumstances (i.e., unique structural issues) in the relevant geographic market; (3) should uncommitted capacity from Boralex's remote generation in the ISO-NE balancing authority area be considered in Boralex's market power analysis; (4) how should transmission import capacity into NMISA be allocated, and what impact will planned transmission additions have on import capabilities; and (5) why is the Boralex Sherman plant currently mothballed.

At the conclusion of the Technical Conference, the MPUC suggested that it would be willing to submit additional information with respect to its position on issue 1, that the NMISA region is the relevant geographic market for Boralex's market power analysis. Commission Staff responded that although such a submittal would be highly unusual, the Commission might be receptive to additional comments with respect to that narrow issue.

On September 4, 2007, the MPUC submitted a request that the Commission permit additional comments by the MPUC (focused on the specific issue of the relevant geographic market for Boralex's market power analysis) by September 12, 2007, and responsive comments by Boralex, the applicant, and Integrys Energy Services, Inc., ("Integrys") the other entity who had sought party status in this proceeding, by September 26, 2007.

On September 7, 2007, the Commission granted the MPUC's request, setting September 12, 2007 as the date by which the MPUC was to file additional comments, and September 26, 2007, as the date by which Boralex and Integrys could file responsive comments.

On September 26, 2007, two sets of responsive comments were filed: an Answer by Boralex, and a Motion to Intervene Out of Time and Reply Comments by NMISA, which had not, to this point, intervened in the proceeding.

III. RESPONSE

The late-filed intervention and Reply Comments submitted by NMISA do not assist the Commission's analysis in any way. Rather, as discussed below, they provide unsupported and irrelevant opinions which, in some cases, are inconsistent with NMISA's own findings in other documents. With respect to Boralex's Answer, the Answer fails to recognize that even though there is no transmission constraint between Northern Maine and New Brunswick, as a practical matter, there is currently no realistic competitive supply available from New Brunswick. Thus, even if the transfer capability between Northern Maine and New Brunswick were unlimited in size and completely unconstrained, the market in Northern Maine would be no more competitive, and the

position of the Boralex generators no less dominant. The reasons for this are discussed at length in the MPUC's Supplemental Comments filed on September 12, 2007.⁵

A. MPUC Response to NMISA Comments

1. NMISA Contradicts Its Own Finding that Northern Maine is Electrically Isolated

In its Reply Comments filed on September 12, 2007, NMISA takes issue with the MPUC's characterization of Northern Maine as "electrically isolated."

The assertion that the Northern Maine market is electrically isolated is only partially correct. The Northern Maine market is not directly connected electrically with the remainder of New England and the United States transmission grid. It is connected to the New Brunswick transmission grid, through which it has access to suppliers in New England, Quebec, and remainder of the Maritimes Provinces.

NMISA Reply Comments at 9. The MPUC, however, is not alone in its assessment that Northern Maine is electrically isolated. Indeed, NMISA itself has made the same assessment. For example, NMISA stated in its Seven Year Outlook:

The dominant characteristics of the Northern Maine Market *are its electrical isolation*, large geographic size, small electric demand, and modest population. The electric system in Northern Maine is not directly interconnected with the rest of New England, including any other Maine utility or any other domestic electric system. NMISA participants, therefore, are not participants in the New England Regional Transmission Organization ("RTO") and are not subject to the control of ISO New England ("ISO-NE"), the entity which operates the New England RTO. The region's only access to the electric system that serves the remainder of Maine and the rest of New England is through the transmission facilities of New Brunswick Power ("NB Power"). The New Brunswick System Operator ("NBSO") is the Balancing Authority and Reliability Coordinator ("RC") for the Control Area that includes the Northern Maine and Maritimes regions.⁶

⁵ See MPUC Supplemental Comments at 5-6.

⁶ NMISA Seven Year Outlook at 2 (emphasis added). NMISA's Seven Year Outlook can be found at <http://www.nmisa.com/documents.htm> (Seven Year Adequacy Base Case).

While NMISA is free to take issue with its own characterization of the market, it should have acknowledged that it has also made the finding that it now seeks to disavow.

2. NMISA Mischaracterizes Available Supply From NB Power

NMISA selectively quotes from the NB Power letter attached to the MPUC's Supplemental Comments in an effort to support its extraordinary conclusion that the Northern Maine market "is performing as well as—or better than—a competitive market should." NMISA comments at 9. However, NMISA wholly disregards the point of NB Power's letter that, although energy supplies were available in the past and should be available after the Point LePreau outage, beginning in April of 2008, New Brunswick is not *now* in a position to be a competitive supplier for Northern Maine load. NMISA completely ignores the upcoming outage which *will* cause a capacity deficiency for the New Brunswick area beginning in April 2008. *See* NMISA Seven Year Outlook at 6.

Further, as discussed below, it is clear that power from the New Brunswick Power Generation arm ("GENCO"), to the extent it is available for export, is not sold for export at the same prices to which it is sold to New Brunswick load and that in fact, the profit from the export sales is used to reduce the rates to New Brunswick consumers.⁷

3. The Existence of An Indirect Connection Through New Brunswick From New England to Northern Maine Does Not Support NMISA's Claim that the Wholesale Market in Northern Maine is Competitive and Fully Functional

The NMISA suggests that an indirect connection through New Brunswick demonstrates that the market is competitive in that it has "access to suppliers in New England, Quebec, and the remainder of the Maritimes Provinces." NMISA Reply Comments at 3. The fact that power *could* be wheeled through New Brunswick does not

⁷ *See supra* at n.9.

demonstrate that there are competing suppliers in the Northern Maine market. In fact, there is no showing by any party that there are multiple suppliers participating in the Northern Maine market and, in fact, all descriptions to date focus on the small number of suppliers in Northern Maine. NMISA itself states that the Northern Maine market “is characterized by a small number of generators and marketers among its Market Participants.”⁸ Further, the recent standard offer solicitation results attest to this fact. Only one Competitive Electricity Provider (“CEP”) bid to supply retail load in Northern Maine and, in the solicitation concurrently conducted by Maine Public Service Company, only one supplier bid to provide wholesale service. These results stand in stark comparison to the facts recently found by the Commission to show a lack of market concentration. In *PPL Montana, LLC*, 120 FERC ¶ 61,096 at P 2, FERC found that the generator seeking market based rate authority had shown that it did not have market power. In deciding that the market was not concentrated, the Commission took into account an RFP by the transmission utility responsible for serving retail load. FERC found that the utility “appeared to have numerous other supply alternatives to PPL Companies.” *PPL Montana* at P 31. Specifically, FERC found that:

...information on the record indicates that 44 proposals were submitted in response to the RFP. Nine of these 44 proposals were for intermediate-term products and 35 were for long-term products. Ten of the 35 long-term bids were eliminated because they were non-conforming or non-competitive. At least eight proposals from different bidders with bids ranging from 85 MW to 300 MW were short-listed. The bids generally ranged in price from \$40 to \$70 per MWh and PPL Companies stated that its bids were within the \$40-\$50 per MWh range.

⁸ NMISA Seven Year Outlook at 9. NMISA also notes that [e]nhancing transmission interconnections with other systems “will increase the opportunity of potential Market Participants to serve load in northern Maine, thereby increasing competition.” *Id.*

Id. Accordingly, FERC should give little or no weight to NMISA’s assertion that numerous suppliers are available because this conjecture is contradicted by (1) NMISA’s own description of the Northern Maine market as having a small number of players, and (2) the single bid response to recent retail and wholesale RFPs, which, unlike the situation in *PPL Montana*, demonstrates that the number of players in Northern Maine are extremely limited.

4. NMISA’s Vague References to Price Differences Between Northern Maine and ISO-NE Fail to Demonstrate that the Northern Maine Market is Competitive

NMISA opines that “[t]he wholesale market in Northern Maine is competitive and functioning well is evidenced, among other things, by the fact that rates in Northern Maine have been consistently below those in ISO New England.” NMISA Reply Comments at 3. This price comparison (if one were to be made on the record rather than on unsupported opinions) between Northern Maine and ISO-NE is not a substitute for the required analysis to determine whether there is a functioning competitive market in Northern Maine. Moreover, NMISA cites no authority for the proposition that the Commission’s market power analysis should be reduced to a price comparison between neighboring but electrically unconnected regions.

B. MPUC’s Response to Boralex’s Comments

1. Boralex’s Reply Comments Fail to Acknowledge that Even Though There Is No Transmission Constraint, Northern Maine Customers Cannot Access New Brunswick Power’s Generation Resources on Similar Terms and Conditions as New Brunswick’s Native Load

Boralex is incorrect in its claim that the MPUC must demonstrate that there is a transmission constraint limiting access to resources outside of the Northern Maine region.

While the situation in which a transmission constraint exists is the one that, in most circumstances, would lead to the consideration of a smaller geographic market, the lack of a transmission constraint to the adjoining sub-area would be significant *only* if there was a source of additional competitive suppliers. As discussed in the MPUC's September 12, 2007 Supplemental Comments, that is not the case in New Brunswick. First, New Brunswick Power owns most of the generation in New Brunswick. Second, the New Brunswick Power generation arm ("GENCO") exports power not needed by New Brunswick load, if surplus is available;⁹ however, such a power is sold at a profit with the profit going back to the distribution company for the benefit of New Brunswick's native load.¹⁰ Thus, New Brunswick export supply, to the extent it is available to serve Northern Maine load, can hardly be said to be available on similar terms to which it is available to New Brunswick load. Accordingly, the mechanistic analysis suggested by Boralex must be rejected in this case, because the absence of a constraint between Northern Maine and New Brunswick does not answer the question of whether there are *competitive* supply options outside of Northern Maine. In this case, there are *not* and therefore, as practical matter, "competitive" supply *is* limited to the two players in Northern Maine. Therefore, even in the absence of a transmission constraint

⁹ As discussed in the MPUC's September 12, 2007 Supplemental Comments, New Brunswick will be experiencing a deficit in available capacity beginning in April 2008 through much of 2009. *See* MPUC September 12, 2007 Supplemental Comments at n.15, *citing* New Brunswick System Operator, 10 Year Outlook: An Assessment of the Adequacy of Generation and Transmission Facilities in New Brunswick, 2007-2016 at 42, located at the following link: <http://www.nbso.ca/Public/en/docs-EN/Notices/10-year%20Outlook%202007.pdf>.

¹⁰ Section 6.3 of the Power Purchase Agreement Between the New Brunswick Power Generating Company ("GENCO") and the New Brunswick Power Distribution Company ("DISCO"). *See also* Revised Additional Evidence submitted September 14, 2007 in 2007 Rate Application Before the Brunswick Energy and Utilities Board—Other Costs at 12 describing the export benefit provided by the GENCO to the DISCO and the GENCO Operating Committee attempts to maximize export benefits. This evidence is available at the following link: <http://www.nbpower.com/en/customers/regulatory/regulatory.aspx>.

between Northern Maine and New Brunswick, it is appropriate to view Northern Maine as the appropriate geographic region rather than the Maritime Control Area.

IV. CONCLUSION

The NMISA's late-filed intervention and Reply Comments lend nothing of value to the record of this case, and Boralex's Answer fails to recognize that even though there is no transmission constraint between Northern Maine and New Brunswick, as a practical matter, there is currently no realistic competitive supply available from New Brunswick. For these reasons, the MPUC respectfully requests that the Commission determine that Northern Maine is the relevant geographic market for the purpose of the Boralex market power analysis.

Dated: October 15, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding either by U.S. Mail or electronic service, as appropriate. Dated at Washington, D.C., this 15th day of October, 2007.

/s/ Harry A. Dupre
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